

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Boston Scientific Corp., et al., No. C02-01474 JW
Plaintiffs, **MODIFIED FINAL PRETRIAL
CONFERENCE ORDER - JURY TRIAL**
v.
Cordis Corp.,
Defendant.

On February 24, 2009, the Court conducted a Further Final Pretrial Conference. Counsel for the respective parties were present. In light of the discussion at the conference, the Court modifies the Final Trial Schedule as follows:

TRIAL SCHEDULE

Jury Selection	March 3, 2009 at 9 a.m.
Conference re: Jury Instructions	March 3, 2009 at 1 p.m.
Sessions 1 - 6 Sessions 7 - 14 Sessions 15 - 22	March 4 - 6, 2009, 8:30 a.m. - 12:00; 1:00 p.m. - 4:30 p.m. March 10 - 13, 2009, 8:30 a.m. - 12:00; 1:00 p.m. - 4:30 p.m. March 17 - 20, 2009, 8:30 a.m. - 12:00; 1:00 p.m. - 4:30 p.m.
Argue & Submit	March 24, 2009 at 8:30 a.m.
Jury Deliberations	March 24 - 27, 2009

Jury Selection

- 1 1. The entire panel will be sworn. The Court will inform the panel of the nature and
- 2 duration of the case and ask any panel member to identify himself or herself if, due to the nature or
- 3 duration of the case or any physical or personal problem, service would impose an extreme hardship.
- 4 The Court will examine panel members claiming hardship and issue appropriate excuses.
- 5 2. The Clerk will call the names of all prospective jurors. Fourteen jurors will be seated in
- 6 the jury box, and the others will be seated in the courtroom in the order in which their names are
- 7 called.
- 8 3. The Court will conduct voir dire of the prospective jurors, including any Court-approved
- 9 questions which have been previously submitted by counsel.
- 10 4. After the Court has completed voir dire, counsel shall ask for permission to approach the
- 11 bench to inform the Court if counsel wish to challenge a particular juror or jurors for cause. If
- 12 counsel wish to challenge for cause, the Court will determine a procedure for hearing the challenge.
- 13 If parties do not indicate a desire to make legal challenges, the jury panel is deemed passed for
- 14 cause, and the parties will be allowed to exercise any peremptory challenges.
- 15 5. Parties are required to responsively indicate any peremptory challenges. In multiple party
- 16 cases, counsel are directed to elect and designate one of their number as "lead" counsel for the
- 17 purpose of exercising joint challenges. The first 8 prospective jurors remaining after exercise of
- 18 challenges shall be seated as jurors. If more than 8 jurors are to be chosen pursuant to Rule 48,
- 19 Fed.R.Civ.P., prior to jury selection, the Court will advise the parties of the number of jurors to be
- 20 chosen and the number of additional peremptory challenges to be allowed. For cases where eight (8)
- 21 jurors are impaneled, each side (individually or jointly) will be allowed four (4) peremptory
- 22 challenges.
- 23 6. Before the remaining panel is excused, the Court will ask counsel if there is any legal
- 24 cause why the panel should not be sworn as the jury for the case. If a party should indicate a desire
- 25 to state legal cause, the Court will determine a time and procedure for ruling on those objections.
- 26 Any objections not stated are deemed waived.
- 27
- 28

Exhibits

7. On the day before the first day of trial, each party shall lodge with Chambers an exhibit binder for each witness, which shall contain all exhibits which the party contemplates offering into evidence through the witness. Any party objecting to an exhibit shall insert a page in front of the exhibit which identifies the party making the objection and the legal ground for the objection. Although an exhibit to which an objection has been made may be shown to the witness, it shall not be displayed to the trier of fact unless the objection is overruled and the exhibit is received into evidence.

8. If the case involves only a few exhibits, instead of witness exhibit binders, the parties may include all exhibits in a single notebook.

9. Unless otherwise ordered, all exhibits shall be in a format compatible with either the video or digital evidence presentation system utilized by the Court for display after it is received into evidence.

10. The parties are encouraged to stipulate to the admission into evidence of all exhibits. If the parties stipulate to admissibility, the parties shall indicate, "I am going to show you Exhibit ___, which is in evidence by stipulation." The exhibit may be shown to the witness and the trier of fact without being formally offered into evidence.

11. The proffering party shall retain custody of all exhibits, schedules, summaries, diagrams or charts to be used at the trial.

Trial Procedure

12. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue; and shall not suggest to the jury directly or indirectly, that it may or should request transcripts or the reading of any testimony by the reporter.

13. Counsel must question witnesses from the podium, using the microphone. Without requesting permission, counsel may approach witnesses for any proper purposes.

14. Address all remarks to the Court, not to opposing counsel.

1 15. Refer to all persons, including witnesses, other counsel and the parties by their surnames
2 and not by their first or given names.

3 16. No demonstrative exhibits, charts, diagrams or enlargements shall be placed within sight
4 of the jury unless previously disclosed to opposing counsel.

5 17. In examining a witness, counsel shall not repeat or echo the answer given by the witness.

6 18. Counsel must stand when making an objection. Arguments on points of law or
7 evidentiary matters shall be made out of the presence of the jury. Thus, when objections or
8 responses to objections are made, only the legal basis of the objections and responses may be stated.

9 19. Offers of, or requests for, a stipulation should be made privately, not within the hearing
10 of the jury.

11 20. Conferences at the bench or sidebar are not favored by the Court. Counsel are
12 responsible for bringing any matters which require hearing out of the presence of the jury to the
13 attention of the Court during a time when the jury is not in session. Any sidebar conferences which
14 are allowed will be off the record. If any counsel wishes to place matters on the record, he or she
15 may so request, and the Court will make a responsive order.

16 21. Counsel have full responsibility to arrange for the appearance of witnesses during the
17 presentation of their case so as to eliminate delay caused by waiting for witnesses who have been
18 placed on call by counsel.

19 22. Unless an agreement to the contrary is entered into by opposing counsel, all nonparty or
20 nonexpert witnesses will be excluded from the courtroom when not testifying. When a witness has
21 completed his or her testimony, the witness is excused unless counsel indicates that he or she wishes
22 the witness to remain subject to being recalled. Any witness who has been excused from further
23 testimony may remain as a spectator. It will be the responsibility of counsel to make an
24 announcement at the time the witness steps down that he or she should remain in the environs of the
25 Court for a reasonable time to permit such counsel an opportunity to secure and serve a subpoena
26 upon the witness and assume responsibility for his or her per diem and other expenses as provided
27 by governing rule or statute.

1 23. Counsel shall admonish all persons at counsel table that gestures, facial expressions,
2 audible comments, or the like, as manifestations of approval or disapproval during the testimony of
3 witnesses, or at any other time, are prohibited.

4 24. Counsel should never, in the presence of the jury, ask the Court reporter to mark or flag
5 a witness's answer to a particular question. Instead, make a note of the time and subject matter of
6 the testimony you want marked, and inform the reporter unobtrusively at the next recess. This is to
7 avoid the use of "marking" as a device for attracting the jury's attention to certain testimony.

8 25. Witness examination shall consist of direct examination, cross-examination and re-direct
9 examination. No recross-examination will be allowed without prior approval of the Court
10 specifically indicating the area for recross-examination. When there are multiple defense counsel,
11 they are directed to confer and designate to the Court the sequence in which they wish to be
12 recognized during trial for purposes of presenting opening statements and conducting cross-
13 examination of witnesses. If one counsel conducts the direct examination of a witness, that same
14 counsel must make objections when the witness is cross-examined. Counsel who will conduct the
15 cross-examination should object while the witness is on direct.

16 26. From and after the moment the case is called for trial, any objection, motion or other
17 application for relief made by any defense counsel, orally or in writing, shall be deemed to be
18 adopted and joined in by every other defendant, without announcement by counsel to that effect, and
19 the rulings of the Court shall be deemed applicable to each defendant unless otherwise stated at the
20 time the ruling is made. Accordingly, it shall be regarded as unnecessary and improper for counsel
21 to rise to "join in" an objection or motion. Rather, counsel should rise to be heard only for the
22 purpose of expressly opting out of an objection or motion if that is his or her position.

23 27. Counsel are directed to deliver to opposing counsel at the end of each trial day (if not
24 earlier) a list of witnesses counsel anticipates calling the next trial day.

25 28. Counsel calling a non-client witness to testify should have no further discussions with
26 that witness concerning the case or any aspect of his or her testimony after the witness has been
27 tendered for cross-examination and until such time as the witness has been tendered back for redirect

1 examination. At all other times, within the bounds of governing ethics and the law, counsel may
2 engage in discussions with witnesses during trial.

3 29. Counsel are directed to schedule any matters to be heard out of the presence of the jury
4 at a time other than that set for the presentation of evidence. Any time taken away from presentation
5 of evidence to the trier of fact due to, for example, lengthy legal motions made during the time
6 allocated to the presentation of evidence, or delays in the commencement of proceedings due to
7 circumstances within the control of counsel, will be deducted from the time allocated for the
8 presentation of evidence. Upon timely application based upon good cause, the Court may relieve a
9 party of its stipulation to the agreed schedule.

10 30. It is the practice of the Court periodically to inform counsel of the Court's record of how
11 much time each side has remaining for the presentation of evidence based upon the stipulated trial
12 schedule.

31. In an effort to heighten juror comprehension and to sharpen the issues in dispute, after
each witness has been excused, counsel may request permission to address the jury for purposes of
commenting on the significance of the evidence. Commentary shall be limited to 5 minutes for each
party. Commentary shall be opened by the side calling the witness (unless waived) and closed by
the side cross-examining the witness. No rebuttal to commentary shall be allowed. Commentary
must conform to the rules of evidence with respect to closing argument. Counsel are cautioned to
avoid any appearance of stating principles of law which apply to the case or expressing any personal
opinion concerning the credibility of witnesses. Time taken for commentary shall be deducted from
the time allocated to each side for the presentation of evidence.

Instructing the Jury

23 32. The Court pre-instructs the jury as to preliminary matters immediately before opening
24 statements, and finally instructs before arguments of counsel. Written instructions are provided to
25 the jury upon retiring for deliberation.

Jury Deliberations

2 33. Counsel and litigants are not required to remain in the courtroom during jury
3 deliberations; however, it is counsel's responsibility to keep the clerk fully informed as to counsel's
4 whereabouts at all times, including the noon hour. Counsel are expected to return to the courtroom
5 within five minutes after being notified to do so. Failure to be available will be deemed waiver of
6 the right to be present.

7 34. The jury will be permitted to take a noon recess or other rest breaks without the
8 necessity of reconvening, and to retire for the evening and resume their deliberations the next
9 morning without reconvening.

Daily Trial Transcript

1 35. Any counsel desiring daily or expedited transcripts during trial should make immediate
2 arrangements with the court reporter and should inform the Court and other counsel of such
3 intentions.

5 | Dated: February 26, 2009

JAMES WARE
United States District Judge

1 | THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

2 Allison H. Stiles astiles@goodwinprocter.com
3 Amanda Marie Kessel akessel@goodwinprocter.com
4 Christopher T. Holding cholding@goodwinprocter.com
5 David T. Pritikin dpritikin@sidley.com
Edward V. Anderson evanderson@sidley.com
Emily J. Cooper ecooper@goodwinprocter.com
Georgia Kloostera VanZanten gvanzanten@sidley.com
Heather P. Sobel hsobel@goodwinprocter.com
Hugh A. Abrams habrams@sidley.com
J. Anthony Downs jdowns@goodwinprocter.com
Jason M. Horst jhorst@flk.com
Joel Dashiell Smith jsmith@flk.com
Lisa Anne Schneider lschneider@sidley.com
Marc A. Cavan mcavan@sidley.com
Matthew Thomas Powers mpowers@sidley.com
Michael F. Kelleher mkelleher@flk.com
Michael G. Strapp mstrapp@goodwinprocter.com
Patrick Eugene Premo ppremo@fenwick.com
Patrick Shaun Thompson pthompson@goodwinprocter.com
Paul F. Ware pware@goodwinprocter.com
Robert D. Leighton rleighton@sidley.com
Robert D. Leighton rleighton@sidley.com
Robert Donald Carroll rcarroll@goodwinprocter.com
Roger B. Mead rmead@flk.com
Roland Schwillinski rschwillinski@goodwinprocter.com
Stephanie Pauline Koh skoh@sidley.com
Susan E. Bower sbower@sidley.com
Teague I. Donahey tdonahay@goodwinprocter.com
Tracy Jean Phillips tphillips@sidley.com

18 || Dated: February 26, 2009

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy